No. 75-804

Supreme Court of the United States

October Term, 1976

JOY A. FARMER, SPECIAL ADMINISTRATOR OF ESTATE OF RICHARD T. HILL,

Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 25, *et al.*,

Respondents.

On Writ of Certiorari to the California Court of Appeals, Second Appellate District

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. ALBERT WOLL
General Counsel, AFL-CIO
ROBERT C. MAYER
815 Fifteenth Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006

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This brief *amicus curiae* is filed on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international unions having a total membership of approximately 14,000,000 men and women, with the consent of the parties as provided for in Rule 42(2) of this Court's Rules.

INTRODUCTION AND SUMMARY OF ARGUMENT

As respondents show in their brief, the present case is a simple one under this Court's precedents. At the heart of petitioner's California's tort law claim was the allegation that he had been denied dispatch from the union's hiring hall because of his opposition to the union business agent and the business agent's policies. Such conduct, if established, is a violation of §§ 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act, as amended (hereafter the "NLRA"), remediable by the National Labor Relations Board (hereafter the "NLRB"). In fact, petitioner did successfully charge the unions with a violation of § 8(b)(2) with respect to the failure to dispatch him to a particular job.

This Court has held, without deviation since *San Diego Unions* v. *Garmon,* 359 U.S. 236, where this was the precise issue for decision, that a state is without power to award damages under its tort law based on non-violent conduct which is an unfair labor practice under the NLRA. And, as the Court of Appeal correctly understood, *Plumbers' Union* v. *Borden,* 373 U.S. 690, is a precedent which squarely forecloses state jurisdiction in this case. Moreover, as respondents also point out, petitioner's attempt to recover under state tort law punitive and other damages which the NLRB is not empowered to award for conduct which the Board has already remedied, conflicts with the remedial scheme of the NLRA and is therefore impermissible not only under *Garmon* but under *Teamsters Union* v. *Morton,* 377 U.S. 252.

Thus, if petitioner had contented himself with attempting to distinguish these precedents, there would be no occasion for a brief *amicus curiae,* for that effort cannot possibly succeed. But he urges also a radical overhaul of the *Garmon* doctrine. While petitioner invokes criticisms of *Garmon* within the Court in support of this attack, the authority cited does not call for the total retreat from *Garmon* necessary to aid petitioner here. For his claim fits into neither of the categories which concerned Mr. Justice White in his dissenting opinion in *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 309.

This case is plainly not one where the aggrieved party is precluded from obtaining a hearing by the Board. (See *id.* at 325-332.)[1]

[1] We agree with the suggestion in Mr. Justice White's dissent (*id.* at 328, n. 6) that the Board should establish a procedure pursuant to 5 U.S.C. § 1554(e) whereby parties who are not in a position to file an unfair labor practice charge may obtain a declaratory order from the Board as to whether particular conduct is within §§ 7 or 8 of the Act and therefore under *Garmon* not regulable by the States. (The Board might also determine that the activity is designedly unregulated, which would also oust State jurisdiction. *Machinists Union* v. *Wisc. Emp. Rel. Bd.,* ..... U.S. ....., 44 U.S.L.W. 5026.) Such an order resolving doubtful issues of subject matter jurisdiction would be wholly analogous to the Board's present procedure (created in response to the enactment of § 14(c)), advising the parties whether a dispute sufficiently affects commerce to warrant the exercise of Board jurisdiction. In both situations the declaratory order eliminates the risk that neither the state nor the Board will act (the equivalent of the result in *Guss* v. *Utah Board,* 353 U.S. 1), or that the State will enter the federal domain (contrary to *Garmon*). And, for the reasons stated in *Garmon* (359 U.S. at 244-245) such a procedure serves the paramount interest of assuring that it is the Board which in the first instance makes the jurisdictional determination where that turns on an interpretation of §§ 7 and 8.

Nor is this a case where the jury awarded "relief for union deprivation of members' state law rights under the union constitution and bylaws." (*Id.* at 309.) Rather, as the case went to the jury the claim was "primarily job related" and thus within the "unmistakable focus of both the NLRA and the LMRA [, which] is on labor-management relations, rather than union-member relations, as such". (*Id.* at 320.)

It is not even arguable here, as it was in *Lockridge,* that the plaintiff's loss of employment opportunities was the consequence of an expulsion or suspension or any other union action that diminished plaintiff's membership status. For, in this case, plaintiff's membership status was entirely unaffected by the union's conduct. And, as this case was tried, it, in contrast to *Machinists* v. *Gonzales,* 356 U.S. 617, and arguably *Lockridge* (403 U.S. at 324), was not based on

an alleged breach of the union constitution.

In short, petitioner's claim cannot be distinguished in any way from that of a non-member who alleges discrimination in a union hiring hall against him in job referrals, an allegation which is plainly beyond the states' competence. Thus, there is no occasion here to reconsider even *Lockridge,* much less *Borden* and its companion *Iron Workers* v. *Perko,* 373 U.S. 701, which hold that where union conduct against both membership rights and job rights *does* create a problem of characterization the court must look to "the crux of the action" (373 U.S. at 697 and 705, following *Gonzales,* 356 U.S. at 618) in determining whether it is subject to the exclusive jurisdiction of the NLRB.

It is noteworthy that while Prof. Cox, on whom petitioner relies heavily in this connection (Pet. Br. 115-117), believes *Gonzales* and *Lockridge* to be irreconcilable, and prefers *Gonzales,* Prof. Cox also agrees with the result in *Borden* and *Perko.* Petitioner's attempt to explain away Prof. Cox's approval ("since those cases involved only lost earnings which the Board had the power to award" (Pet. Br. 117)), misstates both the facts of those cases[2] and Prof. Cox's actual reasoning.[3] The *Lockridge* dissenting opinions likewise do not disagree with *Borden* or *Perko*; indeed, Justice Douglas' dissent expressly accepts those precedents. (See 403 U.S. 302 at 308).

[2] In *Borden* the state court had awarded punitive damages (373 U.S. at 693). In *Perko* the plaintiff had claimed, and apparently recovered, damages for both "past and future loss of earnings" (*id.* at 703). Under § 10(c) of the Act the employee is thought to be "made whole" by "reinstatement" and "back pay" — past earnings. (See *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 419, citing *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 197, and other NLRB cases.)

[3] Prof. Cox wrote:

> "In these cases the employee was complaining only of the deprivation of a job; no union expulsion had occurred. The NLRB could deal with the whole controversy just as in any other case of discrimination encouraging or discouraging union membership. While the facts of these two cases suggest that injustice to the individuals rather than the public interest in self-organization of labor-management relations was at stake, the NLRB's capacity to deal with the whole controversy obviates most of the advantages of allowing state tribunals to grant relief for the losses attendant upon discharge following wrongful expulsion. In addition, a line drawn between claims of wrongful interference with employment and wrongful expulsion lends itself to relative ease and uniformity of administration." (Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337, 1376.)

Indeed, while petitioner quotes Prof. Cox's analysis *in extenso,* he fails to identify Prof. Cox's conclusion, which is only that "it seems best to allow state and federal courts to award damages for procuring an employee's discharge in an action *based upon wrongful expulsion from membership*" (85 Harv. L. Rev. at 1374, emphasis added), and which therefore does not support the result petitioner seeks.

In more normal circumstances we would not be inclined to burden the Court with further argument. However, in light of the broad implication of petitioner's argument concerning the preemption doctrine, we believe it appropriate

We submit, with respect, that a more fundamental reason for drawing the line at this point is because that is where Congress drew it by giving the Board special competence over interference with employment rights based on union membership while leaving improper interference with membership rights to State law and the federal judicial remedy provided by the LMRDA. (See pp. 31-41, *infra.*) In any event, nothing herein turns on this difference.

to develop two further points. First, we show that Congress ratified the *Garmon* rule in 1959 when it considered and enacted amendments to the NLRA. Second, we demonstrate that the regulation of employment discrimination based on union activity is as plainly a central concern of the NLRA as the regulation of the collective bargaining process and its integral component the use of economic weapons affirmed to be beyond the competence of the states last term in *Machinists Union* v. *Wisc. Emp. Rel. Bd., supra,* 44 U.S.L.W. 5026.

ARGUMENT

I

In 1959 Congress dealt directly with the problem of state jurisdiction over labor-management controversies within the commerce power. Congress was entirely familiar with this Court's decisions, particularly *Garner* v. *Teamsters Union,* 346 U.S. 485, and *Guss* v. *Utah Board,* 353 U.S. 1; *Garmon* itself was decided while the bill was being debated in the Senate and before the House considered the question at all. The focus of the debate, and of the legislation, was the problem of the "no-man's land" created by the *Guss* decision, which held, primarily on the basis of the cession proviso to § 10(a) enacted in 1947, that even where the NLRB had declined to exercise its statutory jurisdiction, the states were without authority to act. (See 353 U.S. at 5-10.) The result was that no remedy whatsoever was available.

Despite broad consensus that this "no-man's land" should be eliminated, there was considerable disagreement as to the proper solution. Yet, as we shall show, the partisans of the respective viewpoints shared an understanding that the *Garner-Garmon* principle should govern disputes

over which the Board had not relinquished jurisdiction; indeed, that principle informed the respective positions which they took as well as the compromise which ultimately became law. We begin with an overview of the evolution of the legislation which ultimately was adopted to deal with this problem.

A. S. 505, the Kennedy-Ervin bill, which was referred to the Senate Committee on Labor and Public Welfare, would have required the NLRB to assert jurisdiction over all disputes arising under the Act, but provided that the Board could by agreement with any agency of any state or territory, cede jurisdiction (with certain exceptions) unless the state law was inconsistent with the corresponding provisions of the NLRA. (S. 505, § 601, I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (hereafter "1959 Leg. Hist."), p. 75.) The bill which the Committee reported to the full Senate (S. 1555) was considerably more complex. It would have required the Labor Board to exercise its jurisdiction to the full extent permitted by the Commerce Clause, but would have authorized the Board to enter into agreements with state agencies "whereby such agency is designated as an agency of the Board." Not only would the state agencies have been required to apply federal law, but the bill provided that the decision of a state agency not to proceed would be appealable to the NLRB just as an appeal from the refusal of a regional office of the NLRB to proceed, its orders would be enforced by the NLRB, and temporary relief could be sought by a state agency only with the NLRB's prior approval. (See S. 1555, § 601, I 1959 Leg. Hist., pp. 391-393.)

This provision was opposed by a minority in the Senate

Labor Committee who proposed to allow the states to assume jurisdiction over disputes over which the Labor Board has declined jurisdiction. That proposal was embodied in § 502 of S. 748 (*id.*, p. 141), the Administration bill sponsored by Sens. Goldwater, Dirksen, Allott and others, and in S. 1386, a bill introduced by Sen. McClellan (*id.*, pp. 332-334).

The proponents of the Administration bill challenged the Committee bill as impractical and unrealistic because only a small minority of the states had agencies which would qualify to assume jurisdiction under the terms stated in that bill, and because they believed that no state would adopt legislation to create agencies which would be subordinate to the National Board. They thus doubted whether the Committee bill was any solution at all. They did not question the principle of national uniformity as such; indeed, they disavowed any intention to interfere with the Board's authority where it chose to exercise jurisdiction. But they believed that the unavailability of any remedy, in any forum, was a more serious problem than the absence of total uniformity, particularly since they regarded the Board's refusal to take jurisdiction over controversies as demonstrating that the result would not substantially affect interest of commerce. The advocates of state court jurisdiction empressly disclaimed any intention to permit the states to intervene in any matter over which the Labor Board was willing to take jurisdiction. Sen Goldwater struck the theme in his opening statement:

> "Mr. Goldwater. Mr. President, one of the most important problems which faced the committee was that raised by the existence of the no man's land in labor relations, resulting from a series of decisions by

the Supreme Court. The problem is not a new one. A considerable portion of the 1953 hearings was devoted to the problem of preemption of State law by the Federal statute. During the Senate debate in 1954, my amendment which sought to confer upon the States authority to regulate strikes and picketing was made the first order of business. The bill was recommitted, without taking a vote on my amendment.

"In 1954, we were confronted with Supreme Court decisions, in the Garner and other cases, holding that the Federal law had preempted the field, thus striking down State laws on recognition picketing, mass picketing, secondary boycotts, stranger picketing, picketing in the absence of a labor dispute, strike votes, and so forth. At that time the Supreme Court had told us, in its Garner decision:

> 'Congress, in enacting such legislation as we have here, can save alternative or supplemental State remedies by express terms, or by some clear implication if it sees fit.'

"Congress did nothing about the problem in 1954. Now the problem becomes more acute as a result of the decision of the Supreme Court in the Guss case.

• • •

"In 1954, we assumed that if a business fell below the Board's standard, the State might handle the dispute. However, in the Guss case the Supreme Court held that if interstate commerce was affected, the States might not act, even though the NLRB had declined jurisdiction."[4]

The statements of Senator McClellan, who was the leading spokesman for the Committee minority during the floor

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[4] 105 Cong. Rec. 6537-6538, II 1959 Leg. Hist., pp. 1142-1143.

debate in the Senate, reveal the reasoning of those Senators, and demonstrate that they proposed only a very narrow scope for State authority. In describing his amendment, he said in part:

> "We have a situation in which people are suffering and there is no recourse to any tribunal, to any law, or any source from which they can get relief.
>
> "Mr. President, I do not propose, by offering the amendment, to detract one iota, or to any degree whatsoever, from the authority which the Board now has, but I simply would require the Board to, by rule or regulation, clarify and define those cases which it feels are not of sufficient importance and do not sufficiently burden or interfere with interstate commerce to warrant its time and its attention.
>
> "*Under the proposed amendment the Board would have to issue a general rule to say, 'This class of cases we will not handle.' Then, in order that those cases not be without a remedy and without a tribunal or source where persons can go for correction or redress from the wrong, I propose they would go to the local courts, where the local courts would have jurisdiction to adjudicate.*
>
> • • •
>
> "If the man goes to his attorney and says, 'I want relief from this situation,' and if the attorney looks at the facts and thereafter says, 'I cannot tell from this state of facts and from the rule which has been promulgated by the Board exactly whether the Board has jurisdiction or whether the State courts have jurisdiction under that rule or under that regulation,' then it is provided, Mr. President, that the matter simply be submitted to the Board, exactly as one would file a complaint. The man would say, 'Here are the facts we need to have adjudicated.'

> "The Board within thirty days could either take jurisdiction or decline jurisdiction. If the Board declined jurisdiction, the suit could be brought or the remedy could be sought in the State court or in whatever tribunal might have jurisdiction. If the Board thought it ought to take jurisdiction and that the matter did not come within the rule excluding jurisdiction, then the Board could take jurisdiction and the issue could be settled. The man would get his relief from the Board and his adjudication from the Board."[5]

He then engaged in a colloquy with Sen. Ervin:

> "Mr. Ervin. I want to ask the Senator from Arkansas if he does not think it is a disgrace to any system of justice to have people suffering wrongs and not provide them some remedy?
>
> "Mr. McClellan. I have said that. I have said it is almost a national disgrace, in our system of jurisprudence and our philosophy of government, to find that there are people who are suffering wrongs and who have no remedy. We have brought about this situation by the legislation enacted here.
>
> "Mr. Ervin. The amendment of the Senator would provide a remedy for all controversies arising under the Taft-Hartley Act, would it not?
>
> "Mr. McClellan. It would provide for a remedy somewhere—for a tribunal to adjudicate the matters. The National Labor Relations Board would have the first right. That would be a continuing right. The Board could make it exclusive, or it could yield or cede to the State courts the jurisdiction it did not want to take."[6]

Later in the debate, Sen. McClellan also said:

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[5] 105 Cong. Rec. 6539, II 1959 Leg. Hist., p. 1144.

[6] 105 Cong. Rec. 6540, II 1959 Leg. Hist., p. 1145.

"We must make up our minds to do one of two things. We can act right now, and we can do it very simply.

"There seems to be opposition on the part of those who favor some kind of provision such as that now in the bill, to the State courts having anything to do with cases in which the Federal Government has an interest, and if that interest is not substantial, why not leave the dispute to the State? If there is enough involved, why not compel the National Labor Relations Board to do its duty, to take jurisdiction, and adjudicate the dispute? It is that simple. *If those who do not want the State courts to have anything to do with it or exercise any responsibility in the matter, or to provide relief where the situation is practically completely local, they should offer a simple amendment to compel the National Labor Relations Board to take jurisdiction of all cases and to adjudicate them.* Perhaps the Board cannot do it. Perhaps it is physically impossible for the Board to do it. However, I will tell the Senate what can be done about it. The Board could be compelled to do it, and Congress could give it the tools with which to do the job." [7]

And, again:

"Thousands upon thousands of businesses and thousands upon thousands of workers are left without a tribunal to adjudicate their grievances, yet we are asked tonight to do nothing about it. We are asked to do nothing about it, or to do worse. Thirty-eight of the States and the Territories have no provision for action and have no law which would enable them to comply with or to function under the language reported by the Committee on Labor and Public Welfare.

[7] 105 Cong. Rec. 6547, II 1959 Leg. Hist., p. 1152, emphasis added.

"Let me point out again that Senators should not be misled by the statement that we are yielding jurisdiction to the States. *We are not yielding anything to the States.* The National Labor Relations Board now has jurisdiction, if it will take it. The Board has the jurisdiction. We have given it to the Board.

"Who is causing the oppression? The National Labor Relations Board. Why? Because we put a burden on it which is impossible to fulfill. Why? *Because we do not want to let the States deal with the little affairs which are primarily their business.*

"Since when have we lost complete confidence in the sovereignty and integrity of the States? It is said that this field is too trifling for the Federal Government to deal with. We have before us the absolute evidence that if the Federal Government undertakes to do the job, it will cost tremendous amounts of money. It will be necessary to establish new boards to do this, and to do that, because it is physically impossible for the National Labor Relations Board to do it all.

"What are we asked to do? We are asked to go through a backdoor process. We are not giving any jurisdiction to the States under the proposal in the bill. What we are doing is trying to beg the States to set up an agency to turn over to the Federal Government, which would have to do things as the Federal Government might direct. I do not think a State which has available the necessary brainpower will do it. I do not think the States wils want to do it." [8]

Sen. McClellan's amendment was defeated 39-52 in a roll call vote.[9] Thereafter, the Senate accepted a substitute [10]

[8] 105 Cong. Rec. 6551, II 1959 Leg. Hist., p. 1156, emphasis added.

[9] 105 Cong. Rec. 6552, II 1959 Leg. Hist., p. 1157.

[10] 105 Cong. Rec. 6648, II 1959 Leg. Hist., p. 1174.

for the Committee provision proposed by Sen. Cooper, which became § 701 of S. 1555 as it passed the Senate. (I 1959 Leg. Hist., p. 577.) The Cooper substitute followed the Committee model in permitting only state labor relations agencies (as opposed to courts) to assert jurisdiction, and in requiring the state agencies to follow federal law. The major difference between the Committee and Cooper versions was that the latter did not require an agreement between the NLRB and the state agencies as a condition for the exercise of jurisdiction by the latter.

The scene now shifted to the House. Sen. Goldwater gave testimony before the House Committee on Education and Labor analyzing S. 1555. With respect to § 701, he pointed out as a basic objection that because the vast majority of the states did not have labor relations agencies, additional state legislation would be required before there was any solution to the "no-man's land" problem.[11] He also raised salient procedural objections.[12] He then stated the solution which he favored:

> "The minimum necessary and proper solution for the no-man's land problem is to permit the NLRB to decline jurisdiction of cases where the impact on inter-

[11] The portion of his testimony dealing with § 701 is at 105 Cong. Rec. 10104, II 1959 Leg. Hist., p. 1289.

[12] One of these was with respect to the consequence of a refusal by the State agency to issue a complaint:

> "Another significant consideration is this. The scope and content of the law under Taft-Hartley is developed not only through the affirmative application of the law by the decisions of the Board and the courts, but by the refusal of the NLRB General Counsel to initiate proceedings, i.e., to issue a complaint in any given case. Such refusal is unreviewable and final. The only factor making for a consistent set of precedents in these refusals is that the General Counsel, normally, will try to avoid taking contrary or inconsistent positions in similar cases. But under this amendment, State agencies can refuse to issue complaints, and there is nothing in the amendment to require these refusals to be consistent with each other within the particular State, or consistent with refusals in the other States, or most important of all, consistent with the policy of the NLRB General Counsel in refusing to issue complaints. Thus, *the essential attribute of good law—the predictability which enables potential litigants to know their rights as well as the restrictions or limitations under which they must operate,* and the assurance that rules of law will not be arbitrary, is all but destroyed in this area of the law by the amendment." (*Id.*)

Sen. Goldwater also cast doubt on the advisability and constitutionality subjecting the decisions of State agencies to review by federal district courts (*id.*).

> state commerce is small or remote but to require the NLRB to set up precise standards for doing so. The States should be authorized to entertain all cases which do not meet these NLRB standards, and either through their courts or appropriate labor agencies, apply their own State law to these cases. *The resulting diversity will occur only with respect to cases that are essentially local in character and hence are the type of cases where uniformity is not only unnecessary but undesirable. Technically being in interstate commerce is no sufficient justification for uniformity."* [13]

These views did not prevail with the majority of the House Committee who proposed that the NLRB be required to "assert jurisdiction over all labor disputes arising under this Act." [14] A minority of the House Committee,

[13] *Id.*, emphasis added.

[14] Section 701(a) of H.R. 8342 as reported, I 1959 Leg. Hist., p. 746. The bill would have enlarged the size of the Board and required it to delegate many of its administrative functions to the

however, proposed, as § 701 of H.R. 8400 (the Landrum-Griffin bill), that the Board be empowered to decline to assert jurisdiction "over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction" and that the states be permitted to exercise jurisdiction over all such disputes. Their language was *in haec verba* the same as that of the original Administration bill.[15]

In House floor debate Rep. Landrum returned to the twin themes that the proposals of those who wished to preserve absolute uniformity were no solutions at all, and that under the Landrum-Griffin response the state courts would have jurisdiction only where the Board has surrendered it because of the dispute's limited effect on commerce.[16]

General Counsel. (See H. Rep. No. 741 on H.R. 8342, pp. 17-19, I 1959 Leg. Hist., pp. 775-777.)

[15] I 1959 Leg. Hist., p. 677. Compare § 502 of S. 748, *id.* at 141. The sole difference was that S. 748 would have created a new § 6(b) of the Act whereas H.R. 8400 proposed a new § 14(c).

[16] After stating the problem Mr. Landrum continued:

> "What do we do? We recognize, as the gentlemen in the other body recognized, that something had to be done. The Senate Bill provided: We will permit State agencies other than courts to handle it. But we find that only 10 of the now 50 States have State agencies, leaving about 40 States without any forum and still with a no man's land.
>
> "So, what do we do? The committee says 'No' to the decisions of the courts. The committee says 'No' to the decisions of the National Labor Relations Board, and the committee says You shall take jurisdiction of all labor disputes, thereby bringing about complete federalization of all labor complaints, regardless of how trivial or how small the effect on interstate commerce. What do we say? We say we recognize the National Labor Relations Board decision not to go below that cut-off

The Landrum-Griffin bill, including its state court solution of the "no-man's land" problem was substituted for the Committee bill and passed the House. (105 Cong. Rec. 15859-15860, 15890-15892, II 1959 Leg. Hist., pp. 1691-1692, 1701-1702.)

The Committee on Conference adopted the House bill on this point, with a single exception: the Committee-added a proviso "that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." In reporting to the Senate as Chairman of the Conferees, Sen. Kennedy said of this compromise:

> "No-man's land: The Senate conferees insisted upon an amendment which prevents the NLRB from declining to exercise its existing jurisdiction and thereby depriving both employers and employees of the protection of the National Labor Relations Act. The Landrum-Griffin bill would have allowed the Board to surrender unlimited jurisdiction to the States, 35 of which provide no protection to the rights to organize

line and we say that State agencies, including State courts—State courts, that is all we say—shall have the right to hear these complaints where the effect on interstate commerce is trivial. That is all there is to the no man's land. We give them a place to go to get relief." 105 Cong. Rec. 15519, II 1959 Leg. Hist., 1555.

See also the remarks of Rep. Dixon of Utah, 105 Cong. Rec. 15546-15547, II 1959 Leg. Hist., pp. 1582-1583, culminating in the following:

> "The Griffin-Landrum bill is a step, if a very small one, in the right direction by restoring to the States jurisdiction in labor relations cases only where the NLRB declines jurisdiction. This is a modest offering to the States, but let us at least go that far."

and bargain collectively. The conference report prevents further cession. The current standards of the NLRB assure the widest effective exercise of Federal jurisdiction in the history of the National Labor Relations Act." (105 Cong. Rec. 17898, II 1959 Leg. Hist., p. 1431.)

Sen. Kennedy also engaged in a significant colloquy with Sen. Carroll:

"Mr. Carroll. • • • [F]or the first time—we begin to soften the so-called doctrine of preemption; and we say to the National Labor Relations Board, 'We, the Congress, specify that you must assume jurisdiction of this area.'

"Is not that so?

"Mr. Kennedy. I would state it somewhat differently. As the Senator from Colorado knows, the National Labor Relations Board has not assumed jurisdiction over quite a considerable area of American interstate commerce, for 25 years, because of the manpower problems which would be involved if the Board took jurisdiction over numerous cases which do not have a very substantial effect on interstate commerce.

"In 1959 the Board published jurisdictional standards which, as the Senator has said, resulted in the Board's assuming more jurisdiction over interstate commerce than the Board ever before in its history had assumed. But those not now covered by the jurisdictional standards of the National Labor Relations Board have never been included in its jurisdiction.

• • •

"[W]e [have] provided that the States could assume jurisdiction in that area; but we made sure that the Board would not reverse itself and reject cases over which it now assumes jurisdiction.

• • •

"The Board can change its jurisdictional standards, and can, at any time, assume more jurisdiction; but it cannot assume less jurisdiction than it does today.

"Once again, we arrived at a compromise; and I would say that, very definitely, it is a satisfactory one, all in all." [17]

And, Sen. Goldwater, whose views had prevailed except for the addition of the proviso, again assured his Senate colleagues:

"Mr. President, judging from the colloquy I have heard today on the no man's land, we must keep this in mind Up until 2 years ago, when the Guss decision was handed down by the Supreme Court, we had no such thing as a no man's land. The State courts were taking care of these cases, and there was no problem in the field. So we are not trying something new, Mr. President; we are merely going back to that which was

[17] 105 Cong. Rec. 17902, II 1959 Leg. Hist. 1435. Sen. Kennedy reiterated (*id.*):

"If the 35 States which do not now have State labor agencies which can handle representation proceedings, and so on, determine that the atmosphere of the country is such that punitive legislation is wanted as regards these employees and employers who are engaged in interstate commerce, but who in a sense are being turned over by the Federal Government to the States—if those States feel that this provision is going to serve as an excuse for the passage of laws which would deny them what both the Senate and the House of Representatives, I am sure, would feel would be their rights, then there are several remedies. The first is by having the National Labor Relations Board broaden its jurisdiction—which can be done under our bill. The second is by having the President recommend the reorganization of the Board, so it can handle these cases. The third is by having the Congress make it very clear that the Board must assume its full jurisdiction."

in effect all the years we have had labor law up until 1957, when the Guss decision of the Supreme Court preempted the State area.

I think my colleagues fear rather wrongly in this direction. To me this is one of the most important recommendations of the McClellan committee, in that it will give relief to the small businessmen. Those are the people about whom we are concerned. *We are not interested in State court action in cases which apply to interstate commerce, because it is clear those are involved in interstate commerce and it is clear . . . the NLRB must take jurisdiction.* I am talking about the little grocery store, the service station, or the main street merchant who cannot get relief from the NLRB but who will now be able to get relief from the local and State courts." (105 Cong. Rec. 17904, II 1959 Leg. Hist., p. 1437, emphasis added.)[18]

[18] This tracks his earlier statement to the Senate during the debate on S. 1555 in that body:

> "The cases about which we are talking, the ones with which I am concerned—and I am sure other Senators who have discussed this matter are concerned with them—are obviously cases which are so small that the NLRB will not assume jurisdiction. We who are interested in the 'no-man's land' situation have no idea in the world that the 'no-man's land' action would enter into industry-wide bargaining or into plants of 200, 300, 500, 1,000, or more employees, where interstate commerce is clearly affected.
>
> "Our only concern is for the little man who is operating a garage and who has 5 or 10 employees or for a man like Coffey, who had 10 or 12 truckdrivers; or a small merchant on Main Street, who might have 20 employees. From the very nature and size of the business, I feel certain the NLRB would immediately say it was not interested in such a case. I think we lose sight of that situation.
>
> "*I hope Senators do not believe for 1 minute I think that by providing this kind of relief at the State level I am trying to get the States into matters which are purely interstate commerce, because I am not.*" (105 Cong. Rec. 6641, II 1959 Leg. Hist., p. 1167.)

See also remarks of Sen. Allott at 105 Cong. Rec. 6541 and 6544, II 1959 Leg. Hist., pp. 1146 and 1149.

The common understanding and expectation that the Labor Board's jurisdiction would be exclusive in labor disputes over which it would assert jurisdiction is tellingly confirmed by Sen. Mundt's reaction to the *Garmon* decision itself. *Garmon* was decided on April 20, 1959. The Senate debate, which we have just discussed, on the no man's land problem, took place on April 23 and April 24. The next amendment offered after the adoption of the Cooper substitute, see p. 14, *supra*, was one by Sen. McClellan which, among other things, would have severely limited organizational and recognitional picketing.[19] One of the supporters of this McClellan amendment was Sen. Mundt. He described a case of recognition picketing in which the employer had brought an action in the South Dakota courts and obtained a judgment in excess of $25,000 of which $20,000 were punitive damages awarded by the jury. Sen. Mundt continued:

> "The judgment was unanimously affirmed by the Supreme Court of South Dakota. It is now on appeal to the Supreme Court of the United States.
>
> "Following Monday's decision in the Garmon case, it may well be that the contractor's case will be reversed by the Supreme Court, because in that decision the Supreme Court held that State courts had no right to award damages to a contractor who had been ruined and forced out of business if the picketing was peace-

[19] 105 Cong. Rec. 6646-6647, II 1959 Leg. Hist., pp. 1174-1175. A much revised version regulating this subject was ultimately enacted as § 8(b)(7).

ful, and that the only time the State has jurisdiction is when there is a criminal violation."[20]

In short, those who objected to the *results* of federal preemption of state law attempted to change federal substantive law which the Labor Board would be charged with enforcing; they did not propose that State law be permitted to govern in cases where the Labor Board exerted jurisdiction, or that the states be permitted to exercise concurrent jurisdiction.

B. We are now in a position to see how Congress' enactment of § 14(c) as a solution to the "no-man's land" problem constitutes Congressional ratification of the *Garner-Garmon* principle.

First, the very existence of the problem, the various proposed solutions, and the ultimate legislative compromise are understandable only against the background of a universally shared starting point that absent new legislation the state courts could not take jurisdiction over conduct which might be protected or prohibited by the NLRA (except in cases of violence). If the state courts could have considered conduct which the NLRB might also have determined to be an unfair labor practice within its jurisdiction there would have been no no-man's land. And, the various proposals (two of which, the Senate Committee bill and the Cooper substitute, were exceedingly intricate) for preserving uniformity, and keeping the state *courts* out of labor disputes within the NLRB's range of competence entirely, would have been completely beside the point if the NLRA

[20] 105 Cong. Rec. 6652, II 1959 Leg. Hist., p. 1180. Sen. Mundt's prophecy was fulfilled in *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498.

had left the state courts any concurrent jurisdiction (except over violence).

Second, the sole intention of the proponents of state court jurisdiction was to permit the states to consider cases whose merits the Board would not even consider; there was no intention to grant the state courts concurrent jurisdiction with that of the Board or otherwise to provide duplicate remedies. Their point was that in the absence of NLRB enforcement of federal law they wished to allow state law to operate, and to be administered by state courts; they did not, however, propose that state law would be operative where the Board, by retaining or asserting jurisdiction, makes a federal forum and federal law available. As we have seen, pp. 8-17 *supra*, they buttressed that point by arguing that the very declination of jurisdiction because the commerce guidelines were not met was a determination by the Board that the dispute was of insufficient impact on commerce to require, or even to warrant, uniformity. Indeed, to provide alternative state and federal forums, applying different standards in the same labor dispute, would have defeated their purpose, unmistakably express in the House Committee Report Dissenting Views: "The need today is to reestablish clear lines of authority between the Federal Government and the States."[21]

Third, the enactment of § 14(c) is a striking example of the process of "conflict and compromise between strong contending forces" described by Mr. Justice Frankfurter in *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 99-100, and likewise "counsels wariness in finding by construction

[21] H. Rep. No. 741 on H.R. 8342, p. 97, I 1959 Leg. Hist., p. 855, reprinted in full at pp. 14-15, *supra*.

a broad policy" in favor of state court jurisdiction. It is clear that the Senate minority and House majority could not have achieved a legislative overruling of *Garner* and *Garmon,* in addition to that of *Guss,* if they had thought that additional step desirable. And, as we have seen, they did not at any point even profess such a thought. For, to obtain legislation to give the state courts jurisdiction over controversies which the Board refused to handle, so that no forum was available, the advocates of state court jurisdiction were compelled to agree that the class of cases potentially subject to NLRB jurisdiction be frozen at the August 1, 1959 level—at the highest level in the history of the Act.

Prof. Cox, who was Sen. Kennedy's advisor during consideration of the 1959 amendments, described the effect of the proviso which was adopted by the Conference Report as follows:

> "This proviso writes at least ninety per cent of the Senate philosophy into the NLRA. The NLRB standards on August 1, 1959, embraced the widest jurisdiction in its history. They go far beyond the 1954 yardsticks and substantially beyond 1950 standards. Under this amendment, therefore, labor unions enjoy greater protection for organizational activities and management greater protection against union unfair practices than was available on any occasion prior to October, 1958. *Within this area, the existing doctrines of federal pre-emption are impliedly preserved."* [22]

[22] Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 Minn. L. Rev. 257, 262, footnote omitted, emphasis added.

Prof. Cox may have modified these views when he returned to the subject in an article (discussed at pp. 4-5 and n. 3, *supra*) wherein he criticizes *Lockridge*:

The enactment of Titles I-VI of the LMRDA, which for the first time imposes federal regulation on the internal affairs of unions and which contains anti-preemption provisions in §§ 103, 603 and 604 does not detract from the foregoing analysis; it, indeed, tends to reinforce it. Congress did not, when it regulated internal union affairs, write on a clean slate, as it did when it first regulated collective bargaining and gave statutory support to the right

> "The final reason given by the majority in *Lockridge* for adhering to the 'arguably protected or prohibited' rule was that Congress has by inaction given it tacit approval. Congress was aware of the broad scope of the Court's preemption rulings when it reviewed the federal labor legislation in 1959. The lack of support for amendments reversing the rules except in areas over which the NLRB declined jurisdiction may be understood to indicate acquiescence in their general thrust. But it presses the inference too far to conclude that Congress approved the doctrinal rationale and every particular application. It is equally unrealistic to look to Congress for particular changes in this branch of labor law. Changes in the law of strikes and picketing are always controversial; any such bill would open up a much wider field of controversy. Congress seems able to enact legislation dealing with labor-management relations only in response to a strong swell of public opinion. Although sweeping reversal of precedent turning broad jurisdiction back to the state would run counter to the indications of legislative ratification of preemption as well as to stare decisis, neither should bar further refinement of the judicial analysis effectuating the basic legislative purpose." (Cox, *Labor Law Preemption Revisited, supra,* 85 Harv. L. Rev. at 1376-1377.)

While the "further refinement" of *Garmon* which Prof. Cox suggested would not change the result in this case (see p. 5 *supra*) we must respectfully disagree with his assessment of the proper relationship between judicial precedent and Congressional action.

The 1959 legislative history shows that Congress does indeed legislate with considerable particularity "in this branch of labor law" (85 Harv. L. Rev. at 1377). Congress is fully aware that in labor

to organize and to bargain collectively; rather, Titles I-VI supplement a preexisting body of state law which protects members' rights. The legislative history quite clearly shows that the anti-preemption provisions were included in order to preserve those state created rights. Moreover, § 603(b) establishes that Titles I-VI were not intended to affect any rights or obligations under the NLRA; thus, it stands for the proposition that regulation of membership rights, and the NLRA's regulation of a member's job rights, are to be treated as distinct subjects (even as they were under the *Gonzales* case). It would not accord with this judgment to construe the NLRA differently because Titles I-VI were adopted.

If, nevertheless, one could look to those Titles, it would teach mainly that Congress was quite able to write anti-preemption language when it chose to do so, and that the

legislation as much as in any other field, it must make nice judgments concerning the extent to which individual state judgments will be tolerated. (Compare also § 14(a), which forbits states from interfering with the employer's judgment as to whether his supervisors shall be members of unions (*Beasley* v. *Food Fair of North Carolina,* 416 U.S. 653), with § 14(b) wherein Congress "decided to suffer a medley of attitudes and philosophies on the subject" (*Retail Clerks* v. *Schermerhorn,* 375 U.S. 96, 105). "The purpose of Congress is the ultimate touchstone." (*Id.* at 103.)

More fundamentally, the decision whether to enact legislation or not, is itself a matter of high legislative policy. If Congress is able to enact labor-management legislation "only in response to a strong swell of public opinion," this is because under other circumstances the political equilibrium is in balance. It is not the judicial function to step into the breach and, by overruling considered interpretations and to adopt a new rule which none of the "strong contending forces" has had the political power to enact into law. See *Carpenters' Union* v. *Labor Board, supra,* 357 U.S. at 99-100, quoted at pp. 23-24 *supra.*

absence of anything like §§ 103, 603, and 604 in Title VII confirms our interpretation of the implications of § 14(c).[23]

There is a broader, more general lesson to be drawn from the Congressional effort to deal with the "no-man's land" problem and its ultimate solution. This is that by its nature the problem of allocating competence is a legislative task, not a judicial one. In *Guss,* a majority of the Court determined "that the [cession] proviso to § 10(a) is the exclusive

[23] One commentator has read Justice White's dissenting opinion in *Lockridge* as "strongly suggest[ing] that the savings clauses of the LMRDA actually cut back on the preemptive force of the LMRA." (Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights,* 51 Tex. L. Rev. 1037, 1054.) Whether or not that reading is accurate, the commentator's understanding of the legislative history is, we believe, entirely correct:

> "The savings clauses, however, did not roll back *Garmon* in union-member cases, or extend *Gonzales.* They simply made certain that the *Garmon* logic would not be applied to the LMRDA, a less comprehensive and more cautious statute.
>
> The legislative history of the LMRDA supports a more conservative construction. In the course of debate over the Landrum-Griffin Bill, Senator John F. Kennedy had objected that the Bill was unnecessary, because state law already supplied adequate protections for members against their unions. In some cases, he pointed out, the state law protections were even superior to the federal proposals, and the preemptive effect of the federal act would wipe out those enlightened state law provisions. The sponsors of the Bill deftly slipped around Kennedy's objections by inserting the antipreemption clauses, suggesting that where the state law was better, the union member would have his choice. The clauses indicate that Congress regarded union-member disputes in a different light from union-employer disputes. But it reads too much into the savings clauses to suggest, as Justice White did, that they 'preserve state remedies' against both the LMRDA and the LMRA." (*Id.*)

means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board." (353 U.S. at 9.) This view was based not on this Court's view of policy, but its understanding of that proviso, in light of its background, particularly its source in suggestions in the opinions in *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330, U.S. 767. (See 353 U.S. at 7-10.)[24] The very complexity of the problem which led to presentation at different stages of the legislative process of several alternatives just by those whose principal objective was to preserve the universality of federal law, and the exclusivity of *administrative* decision, shows that only Congress and not this Court could adequately deal with the problem. Most important of all, in this connection, is the actual compromise which was reached: for while this Court could have determined, either by deciding *Guss* the other way originally, or by overruling it there-

[24] With all respect we do not believe that "the reaction to *Guss* indicates that this Court was quite wrong in determining that the non-man's land was justified in the name of congressional intent to achieve uniformity in law and administration." (*Lockridge, supra,* 403 U.S. at 309, 316 (White, J. dissenting).) We have found no statement in the legislative history by any member of Congress disagreeing with the reasoning of *Guss,* that is to say, the opinion's understanding that the § 10(a) proviso established the intent of the 1947 Congress. (The *Bethlehem Steel case, supra,* was apparently not even mentioned in the debates, see I 1959 Leg. Hist., p. xiii.) Rather, the need for a new legislative solution was the product of experience, particularly the states' failure to enter into cession agreements authorized by § 10(a), and the number of cases over which the Board declined to take jurisdiction, which was due in part to its vastly increasing case load and in part to a change in philosophy. (See *Breeding Transfer Co.,* 110 NLRB 493 and related cases decided Oct. 26, 1954.)

after, that the state courts should have jurisdiction wherever the Board declined on commerce grounds to exercise it, the Court could not, on any basis other than pure fiat have required the Board to entertain all disputes over which it would have asserted jurisdiction on August 1, 1959, or any other given date.

The "no-man's land" problem thus teaches that if *Garmon* creates serious injustice (as petitioner contends but which we do not believe), or if that doctrine is contrary to the current Congressional view as to the proper allocation of authority between the federal government and the states, Congress is able to act, and can do so in a manner which far more precisely reflects the accommodation of competing policy considerations than the decision of any court.

Petitioner asserts, without demonstrating, that reversal of *Garmon* "would correct the serious injustices which occur under present law." (Pet. Br. 118.) We submit that Congress has determined what is "justice" among the parties in labor disputes arising out of interstate commerce. Because the line between the just and the unjust depends so often on the determination of what actually happened, and because Congress believed that only a single expert national agency could be relied upon to assess the facts accurately in this often complex field, Congress determined that justice should be administered exclusively by the NLRB. Moreover, Congress itself determined what remedies are "just" for violations of the standards of conduct which it established, while granting to the Board the authority to develop other remedies within prescribed limits which would effectuate "justice" in the broadest sense—"to effectuate the purposes of the Act" which is the measure of justice in this

field. In petitioner's case the claim that important rights are being sacrificed (Pet. Br. 124-125) has a particularly hollow ring. As the Court of Appeal said:

> "We presume that the N.L.R.B. would have correctly decided the additional matters and would have granted the relief, if any, to which Hill was legally entitled if Hill had pursued the matter further before the N.L.R.B. But Hill was apparently dissatisfied with the award of $2,517 from the N.L.R.B. and sought the more generous bounties of a common law jury." (Pet. A-23.)

One final word remains to be said. Petitioner's suggestion that *Garmon* should be abandoned in favor of *Morton*[25] because this would, whenever a preemption issue is raised, "require an examination of policy consideration, such as characterized the pre-*Garmon* decisions" (Pet. Br. 122) ignores the "truism that it is the business of Congress to declare policy and not this Court's" (*Carpenters' Union* v. *Labor Board, supra,* 357 U.S. at 100; see also *Machinists* v. *Labor Board,* 362 U.S. 411, 428.) The *Garmon* decision rests, at bottom, on a full appreciation of, and effectuates, that truism. Mr. Justice Frankfurter had high "regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy • • •" (*Garmon,* 359 U.S. at 243),[26] but he was equally conscious

[25] There is, of course, no inconsistency between *Garmon* and *Morton* (see Resp. Br. pp. 70-73), and both point to the same result here (*id.* at 73-77). In short, "federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the NLRA." *Connell Co.* v. *Plumbers & Steamfitters,* 421 U.S. 616, 635.

[26] Justice Frankfurter had dissented in some of the major substantive supercession cases under the NLRA—*Hill* v. *Florida,* 325

of this Court's duty to implement Congressional policy embodied in legislation which was a valid exercise of the commerce power. And, he understood the true import of Congress' establishment of a national labor policy, and of its grant of jurisdiction to administer that policy to a single agency, the NLRB. It is that understanding which is at the heart of the *Garmon* doctrine, even as it informed *Garmon's* immediate antecedents, the unanimous decisions in *Garner,* in which he joined, and in *Weber* v. *Anheuser-Busch,* 348 U.S. 468, which he too wrote:

> "Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." (*Garmon,* 359 U.S. at 243.)

II

To the extent he does not attack *Garmon,* petitioner argues that the conduct that is the crux of this case—the alleged discrimination in job referrals predicated on his union activities—is a peripheral concern of the federal labor policy and can therefore be concurrently regulated through state tort laws. But, as we now show, there can be no doubt that Congress intended federal law to state the sole measure of what constitutes unlawful job discrimination based on union membership or activity.

Congress' purpose in 1935 was, in the words of § 1 of the

U.S. 538, 547; *Bus Employees* v. *Wisconsin Board,* 340 U.S. 383, 400; and even (alone) in *Mine Workers* v. *Arkansas Oak Flooring Co.,* 351 U.S. 62, 76. He had been in the majority in every case in which state jurisdiction was sustained.

Wagner Act, to "encourag[e] the practice and procedure of collective bargaining." In another society that purpose could perhaps have been achieved without incorporating a statutory protection for the right to "form, join and assist labor organizations"—such as § 7—or without incorporating, as one of the five employer practices made unlawful, a statutory prohibition against employer misuse of the power to hire and fire as a means to encourage certain favored forms of union activity or to discourage disfavored union activity—such as § 8(a)(3). But Congress concluded that prior experience demonstrated that it was not possible to do so in this country. In another society, less dedicated to private enterprise and minimal government intervention in business management, that purpose could have been taken to require an absolute prohibition against employer action that disadvantaged employees who engage in union activity, that is, a prohibition on all activity that has certain "consequences," like the discrimination prohibition eventually enacted in Title VII of the Civil Rights Act of 1964. (See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432.) But, the 1935 Congress regarded that as too far reaching an incursion into business affairs. Instead, a delicate balance was struck between protecting the right to engage in union activity and the right to manage. And, the legislative background to § 8(a)(3) of the Act leaves no doubt that these interests were balanced by forbidding employment discrimination whose purpose is to discourage or encourage union membership.

The Senate Report stated:

> "Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work." S.Rep. No. 573 on S.1958, 74th Cong., 1st Sess., p. 11.)

To the same effect was the view of Senator Walsh:

> "* * * The employer has the economic power; he can discharge any employee or any group of employees when their only offense may be to seek to form a legitimate organization among the workers for the purpose of collective bargaining. This bill declares that is wrong. It declares that the employee has the right to engage in collective bargaining, and it says, 'Mr. Employer, you must keep your hands off; you shall not use that effective power of dismissal from employment which you have and destroy the organization of the employees by the dismissal of one or more of your employees when they are objectionable on no other ground than that they belong to or have organized a labor union.'" (79 Cong. Rec. 7658.)

In *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 147, 182-187, Mr. Justice Frankfurter explained both the background and the nature of the Congressional response:

> "The denial of jobs to men because of union affiliations is an old and familiar aspect of American industrial relations. * * *
>
> "'The Act,' this Court has said, 'does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.' But 'under cover of that right,' the employers may not 'intimidate or coerce its employees with respect to their self-organization and representation.'
>
> * * *
>
> "It is [therefore] no longer disputed that workers

cannot be dismissed from employment because of their union affiliations. Is the national interest in industrial peace less affected by discrimination against union activity when men are hired? The contrary is overwhelmingly attested by the long history of industrial conflicts, the diagnosis of their causes by official investigations, the conviction of public men, industrialists and scholars.

• • •

"Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

• • •

"We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper. Such an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. *Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act.*

• • •

"The natural construction which the text, the legislative setting and the function of the statute command, does not impose an obligation on the employer to favor union members in hiring employees. He is as free to hire as he is to discharge employees. The statute does not touch 'the normal exercise of the right of the employer to select its employees or to discharge them'. It is directed solely against the abuse of that right by interfering with the countervailing right of self-organization." (Footnotes omitted, emphasis added.)

The two sides to § 8(a)(3)—prohibition against discrimination on the basis of union activity and preservation of the right to discharge for non-union related reasons—are synthesized in *American Ship Bldg.* v. *Labor Board,* 380 U.S. 300, 311:

> "Section 8(a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. Under the words of the statute there must be both discrimination and a resulting discouragement of union membership. It has long been established that a finding of violation under this section will normally turn on the employer's motivation. See *Labor Board* v. *Brown,* [380 U.S. at] 278; *Radio Officers' Union* v. *Labor Board,* 347 U.S. 17, 43; *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 46. Thus when the employer discharges a union leader who has broken shop rules, the problem posed is to determine whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization. It is likely that the discharge will naturally tend to discourage union membership in both cases, because of the loss of union leadership and the employees' suspicion of the employer's true intention. But we have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. See, *e. g., Labor Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 347. Such a construction of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise. See *Textile Workers* v. *Darlington Mfg. Co.,* [380 U.S. at] 263."

It is therefore beyond dispute that central to the national labor policy is the even-handed enforcement of § 8(a)(3)'s prohibition against employment discrimination whose pur-

pose is to encourage or discourage participation in union activities. And, as this Court recognized from the first, that prohibition is not limited to actions by anti-union employers against (or in favor of) union members—it was intended also to encompass action by such employers predicated on the scope and intensity of the member's commitment to the union cause:

> "The Board found * * * that, in taking back six of the eleven men and excluding five who were active union men, the respondent [employer's officials discriminated against the latter on account of their union activities and that the excuse given that they did not apply until after the quota was full was an afterthought and not the true reason for the discrimination against them. As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the grounds of skill or ability but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employees would have to wait because five men had taken permanent positions during the strike but it is found that the preparation and use of the list, and the action taken by respondent, was with the purpose to discriminate against those most active in the union. There is evidence to support these findings." (*Labor Board* v. *Mackay Radio Corp.*, 304 U.S. 333, 347.)

Section 8(b)(2) is the precise parallel of § 8(a)(3) which it incorporates by reference. It is for that reason that the 1935 legislative history set out at pp. 32-33, *supra*, was quoted by Mr. Justice Harlan in his concurring opinion in *Teamsters Union* v. *Labor Board*, 365 U.S. 667, 682-683, and why the Court's opinion in that case (which he joined) analyzed

the question whether the operation of the hiring hall there violated § 8(b)(2) in terms of the "true purpose" or "real motive" test established in § 8(a)(3):

> "There being no express ban of hiring halls in any provisions of the Act, those who add one, whether it be the Board or the courts, engage in a legislative act. The Act deals with discrimination either by the employers or unions that encourages or discourages union membership. As respects § 8(a)(3) we said in *Radio Officers* v. *Labor Board*, 347 U.S. 17, 42, 43:
>
> 'The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.'
>
> "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test. *Id.* 347 U.S. 43.
>
> • • •
>
> "It may be that hiring halls need more regulation than the Act presently affords. As we have seen, the Act aims at every practice, act, source or institution which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term or condition of employment. Perhaps the conditions which the Board attaches to hiring-hall arrangements will in time appeal to the Congress. Yet where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. *NLRB* v. *Drivers, Chauffeurs, Helpers, etc.*, 362 U.S. 274, 284-290. *Where, as here, Congress has aimed its sanctions*

only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme." (365 U.S. at 674-675, footnote omitted, emphasis added.)

Thus, the Board error corrected in *Teamsters Union* was the failure to understand that the 1947 Congress left to unions as much (and no more) freedom in running a hiring hall as the 1935 Congress left to the employer at the hiring gate. The policy of the NLRA as amended by the Taft-Hartley Act is that to the extent a union exercises the effective power to hire and fire it should be subject to *precisely* the same legal inhibitions as an employer. And, as this Court emphasized in *Radio Officers* v. *Labor Board*, 347 U.S. 17, § 8(b)(2), of course, follows § 8(a)(3) in that the former protects members who *actively* oppose union officers and policies from union-caused job discrimination, just as the latter protects union members who *actively* oppose the employer's policies from employer-caused job discrimination:

> "The policy of the Act is to insulate employees' jobs from their organizational rights [citing § 7 of the Act]. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." (347 U.S. at 39-40, footnotes omitted.)

For, as § 7 establishes by its very terms,[27] Congress takes a very broad view of the "organizational rights" which the

[27] "Employees shall have the right to self organization, to form, join, or *assist* labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)" (Emphasis added)

Act protects. Congress could in 1947 have determined to protect only non-members against union action, leaving all controversies between unions and their own members to state law. But as *Radio Officers* squarely holds, that was not the choice Congress made. (See also the discussion at Res. Br. 47-48.) Instead, as Mr. Justice Rehnquist stated in *NLRB* v. *Boeing Co.*, 412 U.S. 67, 74-75, "Congress intended to distinguish between the external and the internal enforcement of union rules, and • • • therefore [granted] the Board • • • authority to pass on those rules affecting an individual's employment status but not on his union membership status."

In sum, the precedents teach that as of 1935 Congress occupied the field of employer discrimination on the basis of union membership or activity — and, as of 1947, union causation of or attempts to cause such discrimination— in its entirety; no gap is left to be filled by state regulation in any form or guise. Thus, for a state to establish an automatic "effects" test holding union action which causes an employer's discharge of, or failure to hire, an employee to be illegal whenever it has an adverse effect on organization, although the discharge would be sanctioned by the Board under the "true purpose" test, would be to interfere with the Congressional will. By the same token, for a state to establish such a test for union refusals to refer union members opposed to the union's officers or policies would constitute an impermissible intrusion into the federal domain. In the latter case, the states action would be indistinguishable

from the state prohibition against a concerted refusal to engage in overtime struck down in *Machinists Union* v. *Wisc. Emp. Rel. Board, supra,* 44 U.S.L.W. 5026, or the more expansive view of illegal secondary pressure than that of § 8(b)(4) struck down in *Morton, supra,* 377 U.S. at 258-260.

The potential for such conflicts between federal and state law, absent *Garmon,* was aptly described in an article on which petitioner places heavy reliance:[28]

> "Approval of the state court judgment in *Borden* would have proved disastrous for the uniform regulation of hiring halls approved in the *Local 357* case. Under the state rule a union member could bring virtually any suit against his union in state court, even if the conduct was clearly within the Board's unfair labor practice jurisdiction and the Board was fully capable of remedying the wrong.
>
> "Union conduct on all fours with the *Local 357* case would be no more secure from state prohibition than murder on the picket line. Instead of preserving the national standard for hiring hall regulation, with the focus on union discrimination, the Court would have sanctioned the development of a maze of different regulatory schemes, with the focus on implied contract rights. Board approval of certain hiring hall procedures would be feckless if state law held that those procedures violated rights implicit in the contractual relationship between member and union.
>
> "Congress' close regulation of hiring halls strongly suggests that state law invasions of this federal domain should be discouraged. Moreover, the conflict between

[28] Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, supra,* 51 Tex. L. Rev. 1037.

> state contract law and federal proscriptions against discrimination pits not only two lawmaking bodies and two tribunals, but two entirely different types of law against one another. Preemption should help prevent precisely this kind of conflict. Individual rights under state law should give way here, at least in actions for damages. In the terms *Garmon* used to characterize the *Gonzales* exception, the hiring hall is simply not a 'peripheral concern' of national labor relations legislation."[29]

CONCLUSION

For the foregoing reasons, and those stated in the brief for respondents, the judgment of the Court of Appeal of California should be affirmed.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
815 Fifteenth Street, N.W.
Washington, D.C. 20005

Laurence Gold
815 Sixteenth Street, N.W.
Washington, D.C. 20006

[29] *Id.* at 1054.